SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Case No. 78-1091

Lina Love,
Appellant,

vs.

Lester Maynard,
Appellee

On Appeal From The
Tenth District Court of Appeals,
Franklin County, Ohio

MOTION TO DISMISS OR AFFIRM

CITY OF COLUMBUS
DEPARTMENT OF LAW
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February 28, 1979

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ISSUE PRESENTED FOR REVIEW

WHETHER THE LAST PARAGRAPH OF OHIO REVISED CODE SECTION 701.02, WHICH GRANTS TOTAL IMMUNITY FROM LIABILITY TO POLICE OFFICERS RESPONDING TO AN EMERGENCY CALL, VIOLATES THE EQUAL PROTECTION CLAUSE AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

PART ONE

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. ADDITIONALLY, THE ALLEGED UNCONSTITUTIONALITY OF THE CHALLENGED STATUTE IS BASED UPON THE PURPORTED UNREASONABLENESS OF STATUTORY LANGUAGE NOT WITHIN THE JURISDICTION OF THIS APPEAL.

This Court has been presented with the following single issue for resolution in this appeal:

> Whether the last paragraph of Ohio Revised Code Section 701.02, which grants total immunity from liability to police officers responding to an emergency call, violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.

Should this Court decide to set this case for argument, the only analysis relevant to this issue will be whether the specific governmental immunity outlined above operates to deny the plaintiff-appellant any equal protection or due process rights. The rationality of the statute will depend only and entirely upon whether the police officer's immunity, rather than the municipality's immunity, is reasonable and furthers a legitimate state interest. However, plaintiff-appellant, in her

Memorandum of Jurisdiction, has relied upon the unreasonableness of the municipality's immunity, as granted in the second paragraph of Ohio Revised Code Section 701.02, which states:

> The defense that the officer, agent, or servant of the municipal corporation was engaged in a governmental function, shall be a full defense as to the negligence of: (A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call.

Read together, the preceding paragraph and the challenged paragraph admittedly operate as a total bar to recovery by plaintiffs who are injured by police officers while responding to an emergency call. However, plaintiff-appellant never raised the constitutionality or unreasonableness of the municipality's immunity, and this immunity's status is not now within the jurisdiction of this Court on appeal.

The legal effect of this failure to raise the constitutionality of the municipality's immunity has been the plaintiff-appellant's continued reliance upon the police officer's immunity as being a total bar to recovery by the plaintiff. This is simply not the case. The last

sentence of Ohio Revised Code Section 701.02 only extinguishes a plaintiff's claim against a particular police officer, not the municipality.

This distinction is significant in this appeal, as the issue deals with the alleged unconstitutionality of the "emergency call" statute under the Equal Protection and Due Process clauses. Under these clauses, the rationality between the affected classification created by the statute and the furtherance of a state's legitimate interest is analyzed. In this case, the standard is essentially reasonableness (the "rational-basis" test). Thus, the allegation that a police officer's immunity operates as a total bar to recovery by an injured plaintiff could arguably relate to the reasonableness of the statute. But the only part the of statute properly before this Court does not deal with a total bar to recovery, but only a partial bar. Furthermore, since plaintiff is much less likely to collect substantial damages from the police officer than he or she could collect from the municipality, the part of the statute that is arguably the most harmful to prospective plaintiffs is not the police officer's immunity, but the municipality's immunity.

This appeal must be dismissed because it is predicated on the notion that the police officer's immunity denies injured plaintiffs the right to any recovery. Indeed, all of the plaintiff's cited cases dealing with this issue are concerned with the unconstitutionality of some statute which bars total access to the courts [(Levy v. v. Louisiana, 391 U.S.68 (1968), Olona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968), and National Board of YMCA v. U.S., 394 U.S. 85 (1969)]. The case at bar only deals with a partial denial of recovery to prospective plaintiffs.

In conclusion, this appeal should be dismissed because a necessary part of the challenged statute is not before this Court. In the alternative, the Court should only consider the police officer's immunity as a partial denial of access to the Ohio courts when evaluating its reasonableness.

PART TWO

THE JUDGMENT FROM THE FRANKLIN COUNTY, OHIO COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE QUESTIONS UPON WHICH THE DECISION OF THE CASE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

While arguably raising the question of the constitutionality of the last sentence of Ohio Revised Code Section 701.02 (the "emergency call statute") under the Due Process and Equal Protection clauses of the United States Constitution, this appeal has raised no request for a new constitutional standard, no request for an abrogation of existing constitutional law standards, and no request for an extension of heretofore protected federal civil rights. Therefore, this appeal should be considered to be a request by the appellant to have the "emergency call" statute analyzed under existing constitutional standards. As such, this request by the appellant, if honored, would be a needless and repetitive endeavor by the United States Supreme Court. The

defendant-appellee submits that this Court should consider this Motion to Affirm a proper stage to undertake an adequate analysis of the "emergency call" statute under the Due Process and Equal Protection clauses. For the reasons stated below, this Court should affirm the holding of the Franklin County Court of Appeals and uphold the constitutionality of the "emergency call" statute.

A. The Emergency Call Statute Does Not Deprive The Plaintiff-Appellee Of Her Rights Under The Equal Protection Clause.

In Dunn v. Blumstein, 405 U.S. 330, 335 (1972), this Court set forth the method in which Courts are to determine whether a statute offends the Equal Protection clause:

> To decide whether a law violates the Equal Protection clause, we look, in essense to three things: the character of the classification in question; the individual affected by the classification; and the government interests asserted in support of the classification.

The "emergency call" statute creates a class of police officers who are immune from damages for torts committed while responding to an emergency call. Arguably, the statute also creates a class of injured persons who cannot collect from these police officers. However, neither classification is of such a nature as to invoke the "strict scrutiny" standard of review utilized in equal citizenship cases (race, national origin, religion, alienage in certain situtations, and other "suspect" classes). Nor does either case involve a fundamental interest, which would also invoke the "strict scrutiny" standard of review.

It should be pointed out that the appellant, in her "Memorandum of Jurisdiction," has raised the notion that the class of persons who cannot collect from police officers who commit a tortious act while responding to an emergency call are denied a "fundamental common law right which is accorded to all other persons who suffer tortious injury: the right to seek judicial redress and compensation for the injury occasioned by the tort".

This is not the type of fundamental right that has been uniquely protected by the Court since this Court's "right to vote" holding in Griffin v. Illinois, 351 U.S. 12 (1956). Other fundamental rights have included the right to interstate travel, the right to interracial marriage, the right to appellate access in criminal cases, and the rights of prisoners to be assisted in filing habeas corpus papers. Indeed, Professor Kenneth Karth, in his article, "Forward: Equal Citizenship Under The Fourteenth Amendment", 91 Harv. L. Rev. 1,29 (1977), states:

> The Court has not yet concluded that all denials of access to the courts require strict scrutiny of their justifications. Indeed, the expansion of this category of fundamental interests, at least in civil cases, seems for now to have been called to a halt.

Since the classification created by the emergency call statute involves neither a suspect class nor a fundamental right, the appropriate standard of review is the "rational basis" test, wherein the State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification. McGowan v. Maryland,

366 U.S. 420 (1961). As this Court pointed out in the recent case of Foley v. Connelie, ___ U.S. ___, 55 L.Ed.2d 287, 292 (1978):

> The practical consequence of this theory is that our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives.

The "emergency call" statute is clearly within a State's "constitutional prerogative." State and federal courts have consistantly viewed statutes which create governmental immunities as extensions (or limitations) of a state's sovereign immunity powers under the Eleventh Amendment of the United States Constitution. Indeed, in Agnew v. Porter, 23 Ohio St. 2d 18 (1970), the Ohio Supreme Court defined the "emergency call" defense as a governmental immunity. The United States Supreme Court has long recognized that a state has the sole power to determine whether or not it has consented to be sued. In Palmer v. Ohio, 248 U.S. 32, 35 (1918), this Court held:

> Whether Ohio gave the required consent (to be sued) must be determined by the construction to be given to the (State's) constitutional amendment quoted, and this is a question of local state law, as to which the decision of the state supreme court is controlling with this court, no Federal right being involved.

This Court should now consider the policies and purposes behind Ohio's "emergency call" statute.

Many state courts, including the Ohio Supreme Court, have had occasion to articulate the purposes of "emergency call" statutes. In Agnew, supra, at 25, the Ohio Supreme Court reasoned that:

> An officer must be able to respond to the calls of others that help is needed immediately without the need to initiate a cross-examination calculated to elicit the operative facts upon which the judgment of urgency is based ..... It is the policy of the law to free him from apprehension of liability in case of "false alarm" or cry of "wolf".

Moreover, the California Supreme Court, in Lucas v. Los Angeles, 10 Cal 2d 426, 75 P2d 599 (1938) reasoned that emergency call statutes read in pari materia with other regulatory statutes, disclosed the clear intention of the legislature to recognize the paramount necessity of providing a clear and speedy pathway for emergency

vehicles actually confronted with an emergency in which the entire public might be concerned. In Archer v. Johnson, 90 Ga. App. 418, 83 SE 2d 314, a Georgia appellate court ruled that the public interest required that law enforcement officers in the discharge of their duty to be given sufficient latitutde of action and ample protection and that the immunity available in an "emergency call" statute should apply to negligent acts.

Without the "emergency call" statute, police officers would be in an unenviable situation. If a police officer felt that he or she would be second guessed by a jury as to whether the emergency call dictated the type of action that the police officer took, it is highly unlikely that a police officer would ever "hastily" approach an emergency scene. Where would the public be then? Where would the criminals be?

There are a number of serious deterrents to tortious conduct on the part of the police officer responding to an emergency call. First, since a police officer obviously and necessarily risks great bodily harm

or even death when he drives "negligently," it is highly unlikely that the "emergency call" statute encourages apolice officer to drive recklessly. It is this proposition that makes the "emergency call" statute rational. If police officers could insulate themselves from this risk of great bodily harm, then perhaps plaintiff's assertion that the statute encourages tortious behavior would have some, albeit weak, merit. It, after all, would make little sense to injure one innocent person in order to protect another. But, thankfully, this is not the case. A police officer is not insulated from risk of death or great bodily harm, and even though the officer may accelerate to a speed beyond the posted speed limit, he will do so with great caution so that he can protect himself as well as other drivers.

Second, police officers who drive in a manner which disregards the safety of others face a number of potentially harmful repercussions. They cannot recover as a plaintiff if they themselves are personally harmed, they can be disciplined and even fired if their negligence

is not in some way justified, and they may be subjected to criminal prosecution if their driving behavior does not fall within justifiable parameters.

For the reasons outlined above, Ohio's emergency call statute is reasonable and rationally related to the creation of a class of persons who cannot recover against the police officer.

B. The Emergency Call Statute Does Not Deprive The Plaintiff-Appellant Of Her Rights Under The Due Process Clause.

In Paul v. Davis, 424 U.S. 693 (1976) and Meachum v. Fano, 427 U.S. 215 (1976), this Court outlined the parameters of due process protection for rights protected by state law. Those cases held that a deprivation must consist of a taking of some recognized "right to life, liberty, or property," which may be either a fundamental right (such as voting, interstate travel, etc.) or a state protected right. In this case, there is neither.

As noted earlier, there is no fundamental right involved in an injured person's inability to successfully recover damages from a tortious police officer who is responding to an emergency run. Neither federal constitutional law nor Ohio law require access to state courts for all types of tortious acts or claims. As this Court held in Palmer v. Ohio, supra:

> Persons suing a state for damages are not deprived of their property without compensation, in violation of the Fifth (or Fourteenth) Amendment of the Federal Constitution, by a decision of the court that a state had not consented to be sued.

Moreover, Ohio obviously does not recognize any state right heretofore advanced by the plaintiff-appellant. More simply stated, the State of Ohio has not created any right to which the plaintiff has been denied. There is no "right" for any person to sue a police officer for damages caused while operating a motor vehicle in response to an emergency call. This is a legislative grant of immunity that has been continuously upheld by the Ohio Supreme Court. Agnew v. Porter, supra;

McDermott v. Irwin, 148 Ohio St. 67 (1947); and Lingo v. Hoekstra, 176 Ohio St. 417 (1964). Having no right to sue, plaintiff-appellant has been deprived of none.

Assuming arguendo that there is some substantive right to access for an injured plaintiff towards the police officer tortfeasor, there has been no "taking" or "deprivation" as that term has been used by this Court. All of the cases which deal with procedural due process and unconstitutional "takings" deal with an intentional act or procedure. These intentional acts are of two types: arbitrarily administrative "takings" (See Bell v. Burton, 402 U.S. 525; Morrissey v. Brewer 408 U.S. 471; and Shields v. Utah C.R. Co.., 305 U.S. 177) or intentional deprivations of life, liberty, or property (See Board of Regents v. Roth, 408 U.S. 564 (1972); Goss v. Lopez, 419 U.S. 565 (1975); and Wisconsin v. Constantineau, 400 U.S. 433 (1971). No deprivation has ever been found by this court or any circuit court in a case dealing with an

automobile accident caused by simple negligence. Indeed, under proper due process analysis, this case is not a procedural due process case at all, but rather a substantive due process case, barely distinguishable from an equal protection case.

Under substantive due process, a statute is unconstitutional if it affects a class of injured persons in a manner not reasonably related to a legitimate purpose. Roe v. Wade, 410 U.S. 113 (1973). Since this analysis was conducted earlier under a discussion of the equal protection clause, defendant-appellee will not repeat the entire analysis other than to point out that the purpose of the statute is to encourage police officers to respond quickly to emergency calls. Without immunity from personal liability, it is unlikely that a police officer will "hastily" respond to an emergency call.

The "emergency call" statute, insomuch as it relates to the immunity of the police officer tortfeasor, does not violate the Due Process clause of the U.S. Constitution.

CONCLUSION

For the reasons stated above, the Supreme Court of the United States should dismiss this appeal because there is no substantial federal question. In the alternative, this Court should affirm the decision of the Franklin County Court of Appeals because the issue presented is so unsubstantial that it does not require further argument.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Pursuant to Rule 34.3(c) of the Rules of the United States Supreme Court, I, Paul M. Aucoin, do hereby swear under oath, that:

1. I am an attorney, duly licensed to practice law in the State of Ohio and the U. S. District Court for the Southern District of Ohio, and that,

2. I represent the Appellee, Lester Maynard, and that,

3. I have served a single copy of the attached Motion to Dismiss or Affirm by depositing same and a copy of this Affidavit in a United States Post Office, with first class postage prepaid, to Mr. Stewart R. Jaffy, c/o Mr. Jerry Hultin, Attorneys for Appellant, 21 East State Street, Suite 1100, Columbus, Ohio, 43215, and that,

4. All parties required to be served have been served.

Paul M. Aucoin, Trial Attorney

Sworn to before me and subscribed in my presence this 27th day of February, 1979.

Jacqueline F. Stevens
Notary Public, State of Ohio
My Commission expires 3/27/82